

SENATE No. 1722

The Commonwealth of Massachusetts

PRESENTED BY:

Bruce E. Tarr

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act providing for alternative delivery of infrastructure projects.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Bruce E. Tarr</i>	<i>First Essex and Middlesex</i>
<i>Keiko M. Orrall</i>	<i>12th Bristol</i>
<i>Michael O. Moore</i>	<i>Second Worcester</i>
<i>James Arciero</i>	<i>2nd Middlesex</i>
<i>Kate D. Campanale</i>	<i>17th Worcester</i>

SENATE No. 1722

By Mr. Tarr, a petition (accompanied by bill, Senate, No. 1722) of Bruce E. Tarr, Keiko M. Orrall, Michael O. Moore, James Arciero and others for legislation relative providing for alternative delivery of infrastructure projects. State Administration and Regulatory Oversight.

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

An Act providing for alternative delivery of infrastructure projects.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. The General Laws, as appearing in the 2014 Official Edition, are hereby
2 amended by inserting after chapter 40W the following new chapter:-

3 CHAPTER 40X

4 PUBLIC PRIVATE PARTNERSHIPS

5 Section 1. Notwithstanding any general or special law to the contrary, a public agency, as
6 defined pursuant to section 44A of chapter 149, may elect to use public private partnerships
7 pursuant to section 1 to 18, inclusive.

8 Section 2. As used in section 1 to 18, inclusive, of this chapter the following words and
9 phrases when used in this chapter shall have the meanings given to them in this section unless
10 the context clearly indicates otherwise:

11 “Affected local jurisdiction.” A political subdivision in which all or a portion of an
12 eligible project is located.

13 “Eligible project.” A building or facility, including associated collection and distribution
14 infrastructure, used for public water supply or treatment, storm water treatment and disposal, or
15 waste water treatment and disposal.

16 “Material default.” A default by the operator in the performance of its duties under
17 section 11 which jeopardizes adequate service to the public from an eligible project.

18 “Offeror.” A private entity that submits a proposal under this chapter.

19 “Operator.” The private entity that is responsible for an eligible project or a portion of an
20 eligible project, including acquisition, design, construction, improvement, renovation, expansion,
21 equipping, maintenance and operation.

22 “Private entity.” An individual, corporation, limited liability company, partnership, joint
23 venture or other private business entity.

24 “Public-private partnership agreement.” An agreement between a public agency and a
25 private entity that involves the planning, financing, development, or operation, or combination
26 thereof, of an eligible project using any delivery method or agreement or combination of
27 methods or agreements that the public agency determines will address the needs of the public
28 agency and serve the public interest.

29 “Responsible offeror.” An offeror that has submitted a responsive proposal and possesses
30 the capability to fully perform the contract requirements in all respects and the integrity and
31 reliability to assure good faith performance.

“Revenue.” Any of the following generated by an eligible project:

(1) A user fee.

(2) A service payment.

“Service payment.” A performance-based payment to the operator of an eligible project pursuant to a public-private partnership agreement.

“User fee.” The rate or other charge imposed by the operator or the public agency, as applicable, for use of the eligible project.

Section 3. Grant of Authority

Notwithstanding any general or special law to the contrary, a public agency may solicit proposals and enter into a public-private partnership agreement for an eligible project with that responsible offeror submitting the proposal that is most advantageous to the public agency in accordance with this chapter; provided, however, that the public-private partnership agreement shall not be subject to section 14 to 21, inclusive, of chapter 149A and the competitive bid requirements set forth in sections 44 to 57, inclusive, of chapter 7C, section 39M of chapter 30, or sections 44A to 44J, inclusive, of chapter 149 of the General Laws; and provided further, that each such contract shall be awarded pursuant to chapter 30B of the General Laws, except for clause (3) of paragraph (b) of section 6, clause (3) of paragraph (e) of said section 6, paragraph (g) of said section 6 and sections 13 and 16.

Section 4. Unsolicited proposals.

A private entity may request consideration and approval of a proposed public-private partnership agreement for an eligible project. The request may be submitted to the applicable

public agency, and any proposal under this section shall not be approved unless the public agency follows procedures outlined in section 5. A request shall be accompanied by the following material and information:

(1) A topographic map of 1:2,000 or other appropriate scale indicating the location of the eligible project.

(2) A description of the eligible project, including the conceptual design of the facility or a conceptual plan for the provision of services and a schedule for the initiation of and completion of the eligible project to include the proposed major responsibilities and timeline for activities to be performed by both the public agency and private entity.

(3) A statement setting forth the method by which the private entity proposes to secure the necessary property interests required for the eligible project. The statement shall include the following:

(i) The names and addresses, if known, of the current owners of the property needed for the eligible project.

(ii) The nature of the property interests to be acquired.

(4) Information relating to the current plans, if any, for development of facilities to be used by a public agency that are similar to the eligible project being proposed by the private entity.

(5) A list of all permits and approvals required for the eligible project from federal, state or political subdivisions and a projected schedule for obtaining the permits and approvals.

(6) A list of any utility facilities known to the private entity that may be crossed or affected by the eligible project and a statement of the plans of the operator to accommodate the crossings or affected facilities.

(7) A statement setting forth the private entity's general plans for financing the eligible project, including the sources of the private entity's funds.

(8) The names and addresses of the persons who may be contacted for further information concerning the request.

(9) User fees and other service payments proposed in the public-private partnership agreement, including frequency of assessments and the methodology and circumstances for changes to the user fees or other service payments.

(10) Any additional material and information as the public agency may reasonably request.

Section 5. Solicitation of proposals

(a) The request for proposals for an eligible project shall specify the method for comparing proposals to determine the proposal offering the lowest overall cost to the public agency, including, but not limited to, all capital financing, operating and maintenance and life-cycle costs. If the public agency awards the contract to an offeror who did not submit the proposal with the lowest overall cost, the public agency shall explain the reason for the award in writing. The request for proposals shall set forth performance guarantees, which the selected offeror will be required to meet in operating the eligible project as constructed or improved. The

public-private partnership agreement that is negotiated with the selected offeror based on the request for proposals shall, shall contain the terms required in section 7.

(b) The chief procurement officer of the public agency shall solicit proposals through a request for proposals which shall include those items in subsection of (a) of this section 5 and those items in clauses (1) and (2) of paragraph (b) of section 6 of chapter 30B of the General Laws and the proposed key contractual terms and conditions for the public-private partnership agreement, some of which may be mandatory or non-negotiable. The request for proposals may also request proposals or offer options for fulfillment of other contractual terms and other matters as may be determined by the public agency. The request for proposals shall provide for the submission of separate price proposal and shall indicate when and how the offerors shall submit the price proposal.

(c) Copies of a request for proposals shall be made available to any interested person residing within the affected local jurisdiction upon request to the public agency. A public agency may establish procedures for the distribution of a request for proposals, including the imposition of a fee to reimburse the public agency for the costs of photocopying and mailing.

(d) Offerors shall submit their sealed proposals to ensure that they are received prior to the time and date established for receipt of the proposals. Sealed proposals shall be submitted in the format required by the public agency. All sealed proposals shall be opened at the time, date and place designated in the request for proposals.

(e) The public agency may charge a reasonable fee to cover the costs of processing, reviewing and evaluating the proposal, including reasonable attorney fees and fees for financial and other necessary advisers or consultants.

Section 6. Evaluation of proposals.

(a) Evaluation criteria. A public agency shall evaluate each proposal to determine which one, if any, has the best value for and is in the best interest of the public agency. In making this determination, a public agency may consider any of the following:

(1) Price.

(2) Financial commitment.

(3) Innovative financing.

(4) Bonding Capacity.

(5) Technical, scientific, technological or socioeconomic merit and innovation.

(6) Design, operation and feasibility of the eligible project.

(7) Public reputation, qualifications, industry experience, and financial capacity of the private entity.

(8) The compatibility of the proposal with existing and future land use plans of the affected local jurisdictions.

(9) The compatibility of the proposal with existing statutory, regulatory, and planning requirements of the affected local jurisdictions as well as regional, state, and federal entities

(10) Other factors deemed appropriate by the public agency.

(b) Weighted consideration. The relative importance of each evaluation factor shall be fixed prior to opening the proposals.

(c) Discussion with responsible offerors and revision of proposals. As provided in the request for proposals, discussions and negotiations may be conducted with responsible offerors for the purpose of clarification and of obtaining best and final offers. Responsible offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(d) Selection for negotiation. The responsible offeror whose proposal is determined in writing to be the best value for and in the best interests of the public agency, taking into consideration all evaluation factors, shall be selected for contract negotiation.

(e) Cancellation. A request for proposals may be canceled at any time prior to the time a public private partnership agreement is executed by all parties when it is in the best interests of the public agency.

(f) Award. Upon reaching an agreement with a responsible offeror, the public agency shall enter into a public-private partnership agreement with the responsible offeror. The public-private partnership agreement shall be consistent with the requirements of this chapter. If agreement cannot be reached with the responsible offeror, then negotiations shall be formally terminated with the responsible offeror. If proposals were submitted by one or more other responsible offerors, negotiations may be conducted with the other responsible offeror or offerors in the order of their respective qualification ranking. The contract may be awarded to the responsible offeror whose proposal is then ranked as providing the best value.

Section 7. Implementation

(a) Contracts. Prior to acquiring, financing, designing, constructing, improving, renovating, expanding, equipping, maintaining or operating the eligible project, the private entity shall enter into a comprehensive partnership contract detailing the public-private partnership agreement with the public agency. The contract shall provide for all of the following:

(1) Delivery of maintenance, performance and payment bonds or letters of credit in connection with the acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance or operation of the eligible project, in the forms and amounts satisfactory to the public agency.

(2) Review of plans and specifications for the eligible project by the public agency and approval by the public agency if the plans and specifications conform to standards acceptable to the public agency. This paragraph may not require the private entity to complete design of an eligible project prior to the execution of a contract.

(3) Inspection of the eligible project by the public agency to ensure that the operator's activities are acceptable to the public agency in accordance with the public-private partnership agreement.

(4) Maintenance of policies of liability insurance, copies of which shall be filed with the public agency accompanied by proofs of coverage, self-insurance, in form and amount satisfactory to the public agency and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the eligible project.

(5) Monitoring of the practices of the operator by the public agency to ensure that the eligible project is properly maintained.

(6) Reimbursement to be paid to the public agency for services provided by the public agency.

(7) Filing of appropriate financial statements on a periodic basis.

(8) Policies and procedures governing the rights and responsibilities of the public agency and the operator in the event the contract is terminated or there is a material default by the operator. The policies and procedures shall include conditions governing assumption of the duties and responsibilities of the operator by the public agency and the transfer or purchase of property or other interests of the operator by the public agency.

(b) Fees. The contract may provide for a user fee or service payment, or both. A copy of a service contract must be filed with the public agency. When negotiating a user fee under this section, the parties shall establish payments or fees that are the same for a person using the facility under like conditions and that will not materially discourage use of the eligible project. The execution of the contract or an amendment to the contract constitutes conclusive evidence that the user fee or service payment provided for complies with this chapter. A user fee established in the contract as a source of revenue may be in addition to or in lieu of a service payment.

(c) Grants or loans. In the contract, the public agency may agree to make a grant, if the terms of the grant allow, or loan to the operator from an amount received from the Federal or State government or a political subdivision or from one of their agencies or instrumentalities.

(d) Debt. A public agency may issue and sell bonds or notes for the purpose of providing funds to carry out this chapter with respect to the development, financing or operation of an eligible project or the refunding of any bonds or notes, together with any costs associated

with the transaction. For the purpose of financing an eligible project, the department and operator may apply for, obtain, issue and use private activity bonds available under any Federal law or program. Any bonds, debt, other securities or other financing issued for the purposes of this chapter shall not be considered a debt of the commonwealth or a pledge of the faith and credit of the commonwealth.

(e) Duties. The contract shall incorporate the duties of the operator under this chapter and may contain other terms and conditions that the public agency determines serve the public purpose under section 6. The contract may contain any of the following:

(1) Provisions under which the public agency agrees to provide notice of default and right to cure for the benefit of the operator and the persons specified in the notice as providing financing for the eligible project.

(2) Other lawful terms and conditions to which the operator and the public agency mutually agree, including provisions regarding unavoidable delays or provisions providing for a loan of public funds to the operator to acquire, design, construct, improve, renovate, expand, equip, maintain or operate one or more eligible projects.

(3) Provisions under which the authority and duties of the operator under this chapter shall cease and the eligible project is dedicated to the public agency or, if the eligible project was initially dedicated by an affected local jurisdiction, to the affected local jurisdiction for public use.

(4) Provisions for activities, as necessary, to carry out the purposes authorized in this chapter including, but not limited to, financing, equipment installation and replacement, performance testing and operation, studies, design and engineering work, construction work,

ordinary repairs and maintenance and the furnishing of all related materials, supplies and services required for the eligible project and the management, operation, maintenance and repair of the eligible project.

(f) Amendments. Change in the terms of the contract, as may be agreed upon by the parties, shall be added by written amendment.

(g) Date. In connection with its approval of the eligible project, the public agency shall establish a date for the commencement of activities related to the eligible project. The public agency may extend the date.

(h) Public access. Any documents created by or provided to a public agency under this chapter shall be subject to inspection and copying only to the extent required under section 10 of chapter 66 of the general laws pertaining to access to public records.

(i) Debt capacity. A contract entered into under this chapter shall not enlarge, diminish or affect the authority otherwise possessed by the public agency to take action that would impact the debt capacity of the Commonwealth or any of its political subdivisions.

(j) If, after negotiation with the offeror, the chief procurement officer determines that it is in the public agency's best interests, the chief procurement officer may initiate negotiations with the next most advantageous proposal from a responsible offeror, taking into consideration price, estimated life-cycle costs and the other evaluation criteria set forth in the request for proposals. The chief procurement officer shall award the public-private partnership agreement to the most advantageous proposal from a responsible offeror. Subject to the approval of the public agency, the chief procurement officer shall award the public private partnership agreement by

241 written notice to the selected offeror. The parties may extend the time for acceptance by mutual
242 agreement.

243 (k) Any public-private partnership agreement awarded under this act shall be subject to
244 the terms and conditions as the public agency shall determine to be in the best interests of the
245 public agency. The execution of a public-private partnership agreement under this chapter shall
246 be contingent upon, the selected offeror furnishing to the public agency performance bonds,
247 payment bonds, and liability insurance in the form and in amounts satisfactory to the public
248 agency.

249 Section 8. Term of agreement.

250 (a) Notwithstanding any general or special law to the contrary, public-private partnership
251 agreements awarded under this chapter may provide for a term, not exceeding 20 years, and an
252 option for renewal or extension of operations and maintenance services for 1 additional term, not
253 exceeding 10 years. The renewal or extension shall be at the sole discretion of the public agency
254 in accordance with the original contract terms and conditions or with contract terms and
255 conditions which are more favorable to and acceptable to the public agency.

256 (b) Upon the end of the term of the public-private partnership agreement or in the event of
257 termination of the public-private partnership agreement, the duties of the parties thereto shall
258 cease, except for any duties and obligations that extend beyond the termination as provided in the
259 public-private partnership agreement, and all the rights, title and interest in such eligible project
260 shall revert to the public agency and shall be dedicated to the public agency for public use.

261 (c) A public-private partnership agreement entered into under this chapter may provide
262 that the public agency shall not be exempt from liability for payment of the costs to finance,

263 permit, design and construct modifications or install new equipment and systems at the eligible
264 project necessary to ensure the ability of the eligible project to operate in full compliance with all
265 applicable requirements of federal, state and local law; provided, that the costs shall be amortized
266 over a period that is no longer than the useful life of the modifications, equipment and systems.
267 The public agency's payment obligations for all operations and maintenance services shall be
268 conditioned on the contractor's performance of the services in accordance with all contractual
269 terms.

270 Section 9. Affected local jurisdictions.

271 (a) Notification. Prior to entering into a public-private partnership agreement with a
272 responsible offeror in accordance with this chapter, the public agency shall notify each affected
273 local jurisdiction by furnishing a copy of the proposal to each affected local jurisdiction. The
274 responsible offeror shall reimburse the public agency for costs incurred by the agency in
275 furnishing a copy of the proposal to each affected local jurisdiction.

276 (b) Comments. Each affected local jurisdiction that is not the applicable public agency
277 for the respective eligible project shall, within 30 days after receiving the notice, submit any
278 comments it may have in writing on the proposed eligible project to the applicable public agency
279 and indicate whether the facility is compatible with the local ordinance requirements and other
280 local requirements. The comments shall be given consideration by the public agency prior to
281 entering a public-private partnership agreement with a private entity.

282 Section 10. Powers and duties of operator.

(a) Powers. The operator shall have the power to acquire, design, construct, improve, renovate, maintain, expand, equip or operate the eligible project and impose and collect a user fee or enter into a service contract in connection with the use of its power.

(b) Right. The operator may own, lease or acquire any other right to use or operate the eligible project.

(c) Financing.

(1) Notwithstanding paragraph (2), any financing of the eligible project may be in an amount and upon terms and conditions as may be determined by the operator.

(2) The operator may issue debt, equity or other securities or obligations, enter into sale and leaseback transactions and secure any financing with a pledge of, security interest in or lien on any or all of its property, including all of its property interests in the eligible project.

(d) Operation. In operating the eligible project, the operator may do all of the following:

(1) Make classifications according to reasonable categories for assessment of user fees.

(2) With the consent of the public agency, make and enforce reasonable rules to the same extent that the public agency may make and enforce rules with respect to similar facilities.

(e) Duties. The operator shall do the following:

(1) Acquire, design, construct, improve, renovate, expand, equip, maintain or operate the eligible project in accordance with the public-private partnership agreement.

(2) Keep the eligible project open for use by members of the public as appropriate based upon the use of the facility after its initial opening upon payment of the applicable user fee or

service payment. The eligible project may be temporarily closed because of emergencies or with the consent of the public agency, to protect the safety of the public or for reasonable construction or maintenance procedures as set forth under the public-private partnership agreement.

(3) Maintain or provide by contract for the maintenance of the eligible project, if required by the public-private partnership agreement.

(4) Cooperate with the public agency in making best efforts to establish any interconnection with the eligible project requested by the public agency.

(5) Comply with the public private-partnership agreement and any service contract.

(f) Additional services. This section does not prohibit an operator of an eligible project from providing additional services for the eligible project to private entities or local agencies, other than the public agency that is party to the public-private partnership agreement, if the provision of additional service does not impair the operator's ability to meet its commitments to the public agency under the public-private partnership agreement.

Section 11. Federal, state and local assistance.

The public agency may obtain assistance from the Federal or State government or one of its political subdivisions for an eligible project in accordance with the purposes under section 6) and may enter into a contract in order to receive the assistance. The public agency may pay a portion of the costs of an eligible project directly or indirectly from the proceeds of a grant or loan made by the Federal or State government or one of its political subdivisions.

Section 12. Material default and remedies.

323 (a) General rule. If there is a material default by the operator of an eligible project, the
324 public agency may assume the responsibilities and duties of the operator, in which case it shall
325 succeed to any right, title and interest in the eligible project, subject to any liens on revenue
326 previously granted by the operator to any person providing financing.

327 (b) Condemnation. A public agency which is a party to a partnership contract, and which
328 has the power of condemnation under State law, may exercise the power of condemnation to
329 acquire the eligible project in the event of a material default by the operator. A person who has
330 provided financing for the eligible project, and the operator to the extent of its capital
331 investment, may participate in the condemnation proceedings with the standing of a property
332 owner.

333 (c) Termination. For cause shown, the public agency may terminate the public-private
334 partnership agreement and exercise any other rights and remedies that may be available at law or
335 in equity.

336 (d) Claims. The public agency may make or cause to be made any appropriate claims
337 under maintenance, performance or payment bonds or lines of credit required under this chapter.

338 (e) Procedure after takeover. If a public agency takes over an eligible project pursuant to
339 (a), it may acquire, design, construct, improve, renovate, operate, expand, equip or maintain the
340 eligible project, impose user fees, and comply with service contracts as if it were the operator.
341 Revenue subject to a lien shall be collected for the benefit of and paid to secured parties, as their
342 interests may appear, to the extent necessary to satisfy the operator's obligations to secured
343 parties, including the maintenance of reserves. Liens shall be correspondingly reduced and
344 released when they are paid off. Before a payment to or for the benefit of secured parties, the

public agency may use revenue to pay current operation and maintenance costs of the eligible project, including compensation to the responsible public agency for its services in operating and maintaining the eligible project. The right to receive payment, if any, is just compensation for the eligible project. The full faith and credit of the public agency may not be pledged to secure any financing of the operator by the election to take over the eligible project. Assumption of operation of the eligible project may not obligate the public agency to pay an obligation of the operator from sources other than revenue.

Section 13. Utility Crossings.

Notwithstanding any other provision of law, the following shall apply:

(1) The operator and each public utility, railroad and cable television provider whose facilities are to be crossed or affected by an eligible project shall cooperate fully in planning and arranging the manner of the crossing or relocation of the facilities.

(2) All costs incurred by the public utility, railroad or cable television provider in relocating, constructing or reconstructing its facilities, including temporary facilities, shall be paid by the operator.

(3) If the operator and a public utility, railroad or cable television provider are unable to agree upon costs to be paid by the operator under paragraph (2), the department of public utilities of the Commonwealth shall determine the amount of the payment to be made by the operator.

Section 14. Governmental immunity.

This chapter shall not be construed or deemed to constitute a waiver of the governmental immunity of a public agency or an affected local jurisdiction with respect to participation in or

approval of an eligible project or its operation, including interconnection of the eligible project with another infrastructure or project. An affected local jurisdiction has governmental immunity with respect to an eligible project's design, construction and operation.

Section 15. Special approval.

A public agency may enter into a private-partnership agreement under this chapter only with the approval of its governing body.

Section 16. Exclusivity.

The provisions of this chapter shall constitute the exclusive method of procurement for agreements entered into under this chapter, notwithstanding any other law. In the event of a conflict with another statute or regulation, the provisions of this chapter shall govern.

Section 17. Use of intellectual property.

Unless otherwise agreed and except to the extent not transferable by law, the public agency shall have the right to use all or a portion of a submitted proposal, including the technologies, techniques, methods, processes and information contained in the proposal. Notice of nontransferability by law shall be given to the public agency in response to the request for proposals.

Section 18. Regulations.

The Office of the Inspector General shall, within 12 months of the effective date of this section, promulgate proposed regulations which are necessary to implement the provisions of this chapter.